Submitted on brief by Appt—
A. A. Wheat.
for U.S.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1924

No. 976. [redacted] 37

NASSAU SMELTING AND REFINING WORKS, LTD.,
PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED APRIL 7, 1923.

(29,526)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 23, 1923.

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1 **UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.**

L. 26 320.

UNITED STATES OF AMERICA, Plaintiff,

against

THE NASSAU SMELTING & REFINING WORKS, LTD., Defendant.

Summons.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 16th day of September, in the year one thousand nine hundred and twenty-one. [Seal.] Alex. Gilchrist, Jr., Clerk. Wm. Hayward, United States Attorney, Plaintiff's Attorney. Office and Post-office Address, U. S. Court and P. O. Building, Borough of Manhattan, New York City.

[File endorsement omitted.]

Summons with Demand.

William Hayward, United States Attorney, Plaintiff's Attorney, U. S. Court and P. O. Building, New York City (Borough of Manhattan).

To the defendant within named:

Take notice, That upon default judgment will be taken for the sum of $13,266.02, with interest on $10,621.21 thereof, from Aug. 25, 1920; and on $2,644.81 thereof, from August 20, 1920, besides costs. William Hayward, U. S. Attorney.

2 United States District Court, Southern District of New York.

[Title omitted.]

Complaint.

The plaintiff by William Hayward, United States Attorney for the Southern District of New York, its attorney, complains of defendant and alleges upon information and belief:

For a First Cause of Action:

First. That at all the times hereinafter mentioned plaintiff was, and now is, a sovereign power.

Second. That at all the times hereinafter mentioned defendant was a corporation duly organized and existing under and by virtue of the laws of the State of New York, and at all the times hereinafter mentioned had its principal office on West 29th Street, in the Borough of Manhattan, City, County, State and Southern District of New York.

Third. That in or about the month of June, 1920, the plaintiff through the Rochester District Salvage Board of the Army, advertised for sale to the highest bidder, 74,531 pounds of copper bands F. O. B. Cars Watertown, New York.

Fourth. That thereafter and on or about the 7th day of July, 1920, defendant offered the said Rochester District Salvage Board for said 74,531 pounds of copper bands, the price or sum of Sixteen and 80/100 ($16.80) dollars per hundred pounds, F. O. B. Cars
3 Watertown, New York, a copy of which offer is annexed hereto, made part hereof and marked Exhibit "A".

Fifth. That thereafter and on the 9th day of July, 1920, plaintiff through the Ordnance Department of the Army duly accepted the said offer of defendant for said copper bands, hereinabove set forth, and requested defendant to forward a certified check for fifteen per cent of the total price offered for said copper bands and shipping instructions therefor, a copy of which acceptance is annexed hereto, made part hereof and marked Exhibit "B".

Sixth. That thereafter and on or about the 10th day of July, 1920, defendant duly forwarded to plaintiff's Rochester District Salvage Board approximately fifteen per cent of its said offer, accompanied by a letter, a copy of which letter is hereto annexed, made part hereof and marked Exhibit "C".

Seventh. That thereafter and on or about August 25, 1920, and in pursuance of the contract hereinabove set forth, plaintiff duly delivered the said copper bands to defendant, for which defendant agreed, as aforesaid, to pay the sum of twelve thousand five hundred twenty-one and 21/100 ($12,521.21) dollars.

Eighth. That no part of said sum of $12,521.21 has been paid excepting the sum of $1,900, leaving a balance due and owing from defendant to plaintiff in the sum of ten thousand six hundred and twenty-one and 21/100 ($10,621.21) dollars no part of which has been paid though duly demanded.

4 For a Second Cause of Action.

Ninth. Plaintiff repeats, reiterates and realleges each and every allegation of paragraphs "First" and "Second" in this complaint contained with the same force and effect as though fully set forth at length herein.

Tenth. That in or about the month of July, 1920, plaintiff through the Rochester District Salvage Board of the Army advertised for sale to the highest bidder approximately 34,000 pounds of pig lead F. O. B. Cars Schenectady, New York.

Eleventh. That thereafter and on or about the 27th day of July, 1920, defendant offered the said Rochester District Salvage Board for said approximately 34,000 pounds of pig lead, the price or sum of Eight and 55/100 ($8.55) dollars per Hundred pounds, F. O. B. Cars Schenectady, New York, a copy of which offer is annexed hereto, made part hereof and marked Exhibit "D".

Twelfth. That thereafter and on or about the 29th day of July, 1920, plaintiff through the Ordnance Department of the Army duly accepted the said offer of defendant for said pig lead, hereinabove set forth, and requested defendant to forward a certified check for ten per cent of the total price offered for said pig lead and shipping instructions therefor, a copy of which acceptance is annexed hereto, made a part hereof and marked Exhibit "E".

Thirteenth. That thereafter and on or about the 30th day of July, 1920, defendant duly forwarded to plaintiff's Rochester District Salvage Board, approximately ten per cent of its said offer, accompanied by a letter, a copy of which letter is annexed hereto, made part hereof and marked Exhibit "F".

5 Fourteenth. That thereafter and on or about August 20, 1920, and in pursuance of the contract hereinabove set forth, plaintiff duly delivered 34,337 pounds of pig lead to defendant, for which defendant agreed as aforesaid to pay the sum of two thousand nine hundred and thirty-five and 81/100 ($2,935.81) dollars.

Fifteenth. That no part of said sum of $2,935.81 has been paid excepting the sum of $291, leaving a balance due and owing from plaintiff to defendant in the sum of two thousand six hundred and forty-four and 81/100 ($2,644.81) dollars, no part of which has been paid though duly demanded.

Wherefore, plaintiff demands judgment against defendant $13,266.02 with interest on $10,621.21 thereof at 6% per annum from August 25, 1920, and with interest on $2,644.81 thereof at 6% per annum from August 20, 1920, together with the costs and disbursements of this action. William Hayward, United States Attorney for the Southern District of New York, Attorney for plaintiff. Office and Post Office Address: United States Courts and Post Office Building, Borough of Manhattan, City of New York.

6 **Exhibit "A" to Complaint.**

The Nassau Smelting & Refining Works, Ltd.,

New York,

July 7, 1920

Rochester Special Salvage Board, 1011 University Ave. Rochester, N. Y.

GENTLEMEN: Please refer to Bulletin 7, which is dated June 30th but did not reach us until today. Being interested in the purchase of Copper Scrap Lot 15, we immediately called you over the telephone, and were very sorry to understand that Item #1, representing by far the largest part of this lot, was sold on Saturday last.

We do not understand why circulars either should be mailed to some prospective bidders at an earlier date than they are mailed to others, or advance information given, with the result that sales are made before the trade at large is even aware of the material being available. Such information as you may be able to give us on this point would be appreciated. We would also be glad to be advised to what extent Item #1 was awarded, and at what price.

In the meantime, understanding from you that items #2 to 5 are still available, we submit you for this material 16.80c per lb. f. o. b. cars Watertown, subject to acceptance today. In connection with your request for a telegraphic confirmation of the above, we have just wired you as per copy enclosed. Yours very truly, The Nassau Smelting & Refining Works, Ltd., per ——— ———.

7 **Exhibit "B" to Complaint.**

Copdak

Official Telegram.

John W. Foster, Chairman Comm. on Sale of Materials.

July 9, 1920—11:35.

The Nassau Smelting & Refining Works, Ltd., West 29th St. Between 11th & 12th Sts., New York City:

Your bid sixteen eighty per hundred weight for copper bundlewire ton lots accepted kindly forward certified check fifteen percent value of sale with shipping instructions stop seller No 12658, Army Ordnance Rochester, N. Y.

8 **Exhibit "C" to Complaint.**

Copied.

The Nassau Smelting & Refining Works, Ltd.

New York, July 10, 1920.

Rochester District Salvage Board, 1041 University Ave., Rochester, N. Y.:

GENTLEMEN: We beg to acknowledge receipt of your telegram of yesterday, advising acceptance of our offer for the purchase of Items #2 to 5, Lot 15, Copper Scrap at 16.80c per lb., f. o. b. cars Watertown.

In accordance with your request, we herewith hand you certified check for $1,900.00, being approximately 15% of the value of the lot.

In view of the many prevailing embargoes, we are unable to give you definite shipping instructions at this moment, but we expect to furnish same during the early part of the coming week, and we have no doubt this will be entirely satisfactory. Yours very truly, The Nassau Smelting & Refining Wks., Ltd., per ——— ———

9 **Exhibit "D" to Complaint.**

Copied.

Telegram.

222NY. C 12. 5.31 P. M.

New York, Jul. 27.

Rochester District Salvage Board, 1041 University Ave., Roch.:

Telegram received offer eight fifty five F. O. B. cars Schenectady wire acceptance today. Nassau Wks.

10 **Exhibit "E" to Complaint.**

Official Telegram.

War Department, W. D.

Rochester Ordnance District Office,

1244 University Avenue,

Rochester, N. Y.

Division Salvage.

John W. Foster, Chairman Comm. on Sale of Mate.

July 29, 1920—10.05 a. m.

Nassau Smelting & Refining Works, W. 29th between 11th and 12th, New York City:

We accept your offer eight fifty five per hundred weight on approximately thirty four thousand pounds pig lead located Schenectady Kindly send certified check ten per cent with shipping instructions period Weller.

No 12193. Army Ordnance, Rochester, N. Y.

11 **Exhibit "F" to Complaint.**

Copy.

July 30, 1920.

Rochester District Salvage Board, 1044 University Avenue, Rochester, N. Y.

GENTLEMEN: We beg to confirm our letter of yesterday, and herewith hand you certified check for $291.00 which is 10% of the estimated value of the Pig Lead purchased of you.

Please be advised that we would like to have this Pig Lead shipped to: Safety Insulated Wire & Cable Co., E. 22nd St. Station, Bayonne, N. J., C. R. R. of N. J. delivery.

In making shipment, care should be taken to insure absolute accuracy of count and weight and to obtain a properly signed bill of lading showing the number of pigs shipped. Yours very truly, The Nassau Smelting & Refining Works, Ltd. R. KJR/SB.

P. S.—If shipment can be made at once, please advise and we will send check for the balance.

12 COUNTY OF NEW YORK, ss:
Southern District of New York,

Francis A. McGurk, being duly sworn, deposes and says that he is an Assistant to the United States Attorney for the Southern District of New York and has personal charge of this litigation.

That he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason why this verification is made by deponent and not by the plaintiff is that plaintiff is a sovereign power.

That the sources of deponent's information and the grounds of his belief as to the matters herein stated to be alleged upon information and belief are communications received from the Ordnance Department of the United States Army in possession of deponent.

Francis A. McGurk.

Sworn to before me this 24th day of January, 1922. Carl Brecher, Notary Public, Kings County. (Seal.) Clerk's No. 196, Register's No. 3178. N. Y. Clerk's No. 347. Reg's No. 3310. Commission expires March 30, 1923.

13 & 14 [File endorsement omitted.]

Service of a copy of the within is hereby admitted. New York January 25, 1922. Jeremiah Wood, Attorney for Dept. To Jeremiah Wood, Esq., Attorney for Dept., 115 Broadway. Rec'd 1 25 22. H. Answer Fdy 11 22.

15 United States District Court, Southern District of New York.

8806.

[Title omitted.]

Amended Answer.

The defendant for its amended answer to the complaint of the plaintiff herein alleges upon information and belief:

As and for a First Set-off or Counterclaim to the Two Causes Set Forth in the Complaint.

I. That at all the times hereinafter mentioned the defendant was and now is a corporation duly organized and existing under and by virtue of the laws of the State of New York having its principal office in the Borough of Manhattan, City, County, State and Southern District of New York.

II. That on or about the 28th day of November, 1917, the defendant in good faith entered into an agreement with Colonel J. F. Hofer, Ordnance Department, an officer or agent acting under the authority, direction or instruction of the Secretary of War during the emergency arising from the declaration of war with the German Empire and prior to November 12, 1918, for a purpose connected with the prosecution of the war.

III. That said agreement was that the defendant manu-

16 facture for the United States 1,250,000 copper driving bands

for 155 m m shells, such bands to be manufactured in accordance with Ordnance Office Drawing Class 75, Division 4, Drawing 25, last revised October 24, 1917, in accordance with a brown print furnished by the Government of the United States. The United States on its part agreed to furnish one pound of copper for every pound of completed bands according to the maximum weight as specified on the drawing referred to and to pay the defendant for the services rendered to it a toll price of eight and three-quarters (8¾c) cents per pound for the bands so ordered. That subsequently said agreement of November 28, 1917 was amended by mutual consent by reducing the number of bands to be manufactured by this defendant to approximately 750,000.

IV. That prior to the 12th day of November, 1918, the defendant did actually perform said contract and did manufacture and deliver in pursuance of said agreement 750,820 bands of the maximum weight as specified in said drawings of 1,606,755 pounds.

V. That the amount payable to this defendant by the United States for the manufacture of said bands in accordance with said agreement was $140,591.06, of which there has been paid to the defendant by the United States $134,567.25, leaving a balance still due and owing the defendant from the United States of $6,023.81, for which the defendant duly presented its claim before June 30th, 1919, in accordance with the provision of Section 1 of the Act of March 2, 1919, referred to in paragraph "VI" hereof.

17 VI. That the said agreement above described was not executed in the manner prescribed by law and is within the provisions of Section 1 of the Act of Congress approved March 2, 1919 entitled "An Act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes."

VII. That the Secretary of War has refused to offer a satisfactory adjustment, payment or compensation as provided for in Section 1 of said Act of March 2, 1919 and has refused to pay said balance due the defendant and that by reason of the refusal of the Secretary of War to offer a satisfactory adjustment, payment or compensation, the Court of Claims has jurisdiction of the subject matter hereof to find and award fair and just compensation to this defendant.

VIII. That the claim of this defendant herein set forth is less than $10,000 and pursuant to the provisions of Subdivision 20 of Section 24 of the Judicial Code of the United States this court has jurisdiction to find and award fair and just compensation to the defendant.

IX. The defendant therefore prays that this court find and award to it the said balance owing of $6,023.81 and set off said amount against the amount sought to be recovered by the plaintiff in this action.

As and for a Second Set-off or Counterclaim to the Two Causes of Action Set Forth in the Complaint.

X. That at all the times hereinafter mentioned the defendant was and now is a corporation duly organized and existing under and by virtue of the laws of the State of New York having its principal office

in the Borough of Manhattan, City, County, State and
18 Southern District of New York.

XI. That on or about the 15th day of December, 1917 the defendant in good faith entered into an agreement with Colonel J. E. Heller, Ordnance Department, an officer or agent acting under the authority, direction or instruction of the Secretary of War during the emergency arising from the declaration of war with the German Empire and prior to November 12, 1918, for a purpose connected with the prosecution of the war.

XII. That said agreement was that the defendant manufacture for the United States 100,000 copper driving bands for 75" shells, such bands to be made in accordance with the specifications on Ordnance Office drawing 75-4-24 last revised October 17, 1917. The United States on its part agreed to furnish one pound of copper for every pound of finished bands according to the maximum weight as specified on drawings furnished by the United States to the defendant and to pay the defendant for the service rendered to it a toll price of eight and three-quarters (8¾) cents per pound for the bands covered by said agreement.

XIII. That this defendant did prior to the 12th day of November, 1918 perform said contract in part and suspended further performance thereof upon direction of the United States and this defendant did actually manufacture and deliver in pursuance of said agreement 72,875 bands of the maximum weight as specified in the drawings furnished by the United States of 662 1/4 pounds.

XIV. That the amount payable to this defendant by the United States for the manufacture of said bands in accordance with said agreement was $57,962.98 of which there has been paid to
19 the defendant by the United States $52,126.56, leaving a balance still due and owing the defendant from the plaintiff of $5,836.42 for which the defendant duly presented its claim before June 30, 1919, in accordance with the provision of Section 1 of the Act of March 2, 1919, referred to in paragraph "XV" hereof.

XV. That the said agreement above described was not executed in the manner prescribed by law and is within the provisions of Section 1 of the Act of Congress approved March 2, 1919 entitled "An Act to provide relief in cases of contracts connected with the prosecution of the war and for other purposes."

XVI. That the Secretary of War has refused to effect a satisfactory adjustment, payment or compensation as provided for in Section 1 of said Act of March 2, 1919 and has refused to pay said balance due the defendant and that by reason of the refusal of the Secretary of War to offer a satisfactory adjustment, payment or compensation the Court of Claims has jurisdiction of the subject matter hereof to find and award fair and just compensation to this defendant.

XVII. That the claim of this defendant being not more than $10,000 and pursuant to the provisions of Subdivision 20 of Section 24 of the Judicial Code of the United States this court has jurisdiction to find and award fair and just compensation to the defendant.

XVIII. The defendant therefore prays that this court find and award to it fair and just compensation, to wit, the said balance of $5,836.42 and that the amount thereof be set off against the amount for which the plaintiff seeks judgment in this action.

20

As and for a Third Set-off or Counterclaim to the Two Causes of Action Set Forth in the Complaint.

XIX. That at all the times hereinafter mentioned the defendant was and now is a corporation duly organized and existing under and by virtue of the laws of the State of New York having its principal office in the Borough of Manhattan, City, County, State and Southern District of New York.

XX. That on or about the 15th day of December, 1917, the defendant in good faith entered into an agreement with Colonel J. U. Hoffer, Ordnance Department, an officer or agent acting under the authority, direction or instruction of the Secretary of War during the emergency arising from the declaration of war with the German Empire and prior to November 12, 1918 for a purpose connected with the prosecution of war.

XXI. That said agreement was that the defendant manufacture for the United States 100,000 copper driving bands for 6" shells such bands to be manufactured in accordance with specifications on Ordnance Office drawing 7-7-42 last revised November 13, 1917 and with such Ordnance office drawing. The United States on its part agreed to furnish one pound of copper for every pound of finished bands according to the maximum weight as specified on the drawing herein referred to, and to pay the defendant eight and three-quarters (8¾c) cents per pound for these articles f. o. b. the plant of this defendant.

XXII. That this defendant did partly perform said contract prior to the 12th day of November 1918 and suspended completion thereof at the request of the plaintiff through its proper officers and did actually manufacture and deliver in pursuance of said agreement 92,367 bands of the maximum weight as specified in the drawings above referred to of 196,071 pounds.

21

XXIII. That the amount payable to this defendant by the United States for the manufacture of said bands in accordance with said agreement was $13,100.96 of which there has been paid to the defendant by the United States $10,824.87 leaving a balance still due and owing the defendant from the United States of $2,576.09, for which the defendant duly presented its claim before June 30, 1919, in accordance with the provision of Section I of the Act of March 2, 1919, referred to in Paragraph "XXIV" hereof.

XXIV. That the said agreement above described was not executed in the manner prescribed by law and is within the provisions of Section I of the Act of Congress approved March 2, 1919, entitled "An Act to provide relief in cases of contracts connected with the prosecution of the war and for other purposes."

XXV. That the Secretary of War has refused to offer a satisfactory adjustment, payment or compensation as provided for in Sec-

tion I of said Act of March 2, 1919, and has refused to pay said balance to the defendant as above set forth and by reason of the refusal of the Secretary of War to offer satisfactory adjustment, payment or compensation the Court of Claims has jurisdiction of the subject matter hereof to find and award fair and just compensation to this defendant.

XXVI. That the claim of this defendant herein set forth is less than $10,000 and pursuant to the provisions of Subdivision
22 20 of Section 24 of the Judicial Code of the United States this court has jurisdiction to find and award fair and just compensation to the defendant.

XXVIII. The defendant therefore prays that this court find and award to this defendant as just and fair compensation the said balance of $2,576.00 and that it set off the amount thereof against the amount sought to be recovered by the plaintiff in this action.

Wherefore, the defendant prays

1. That this court inquire into the matters and things set forth in the set-offs and counterclaims in this amended answer alleged and find and award just compensation to this defendant by reason of said three separate claims against the plaintiff.

2. That it set off the amount awarded to the defendant on each of said claims against the amount sought to be recovered by the plaintiff in this action.

3. In the event the total amount of set-offs or counterclaims shall equal the amount sought to be recovered by the plaintiff in this action that judgment be in favor of the defendant.

4. In the event that the total amount of said set-offs or counterclaims shall exceed the amount sought to be recovered by the plaintiff in this action that judgment be in favor of the defendant for such excess. Jeremiah Wood, Attorney for Defendant, Office & P. O. Address 115 Broadway, Borough of Manhattan, City of New York.

23 & 24 County of New York,
Southern District of New York, ss:

Leo Lowenstein, being duly sworn, deposes and says: That he is the Secretary of the defendant in the within action; that he has read the foregoing amended answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

That the reason this verification is made by deponent and not by defendant is because said defendant is a domestic corporation and deponent is an officer thereof, to wit, its Secretary; that the grounds of deponent's belief as to all matters in said amended answer not stated upon his knowledge are investigations which deponent has caused to be made concerning the subject of this action and information acquired by deponent in the course of his duties as an officer of the defendant corporation in this action. Leo Lowenstein.

Sworn to before me this 7th day of June, 1922. Nelson A. Barlow, Notary Public, New York County No. —. (Notarial Seal.)

25 [File endorsement omitted.]

26 & 27 United States District Court, Southern District of New York.

8806.

[Title omitted.]

Notice of Motion.

Sir: Please to take notice that upon the pleadings and proceedings heretofore had and taken herein, the undersigned will move the Court at a stated term thereof duly appointed to be held in and for the Southern District of New York, in Room 235, United States Courts and Post Office Building, in the Borough of Manhattan, City of New York, on the 16th day of June, 1922, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the counterclaims set up in the amended answer of defendant herein and for judgment on the pleadings, and for such other and further relief as the Court may seem just and proper in the premises.

Dated: New York, June 8, 1922. Yours, etc., William Hayward, United States Attorney for the Southern District of New York, Attorney for Plaintiff. Office & Post Office Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York. To: Jeremiah Wood, Esq., Attorney for Defendant, 115 Broadway, New York City.

28 [File endorsement omitted.]

29 United States District Court, Southern District of New York.

8806.

[Title omitted.]

On Motion of Plaintiff for Judgment.

Memorandum Opinion.

William Hayward, United States Attorney, Attorney for Plaintiff. Francis A. McGurk, Assistant U. S. Attorney, of Counsel.

Gilbert & Gilbert, Attorneys for Defendant. A. S. Gilbert, Alfred Frankenthaler, of Counsel.

MACK, *Circuit Judge:*

The defendant seeks to set off or to counterclaim as against an admitted indebtedness to the plaintiff three separate amounts for

balances due on account of work done pursuant to the terms of three separate contracts with the War Department. Its set-offs or counterclaims are asserted to be within the provisions of Section 1 of the Act approved March 2, 1919 Chapter 94.

30 The Secretary of War is alleged to have refused to offer a satisfactory adjustment, payment or compensation as provided in Section 1 of said act.

The difficulty that defendant sees is, however, that a remedy against the United States under the alleged contracts and pursuant to the said statute is vested exclusively in the Court of Claims, as stated by the Supreme Court in U. S. v. Pitsch, Supreme Court of U. S., June 1, 1921.

The Court is therefore without jurisdiction to determine whether or not, by reason of the facts set forth by the defendant, there is any credit, set-off or counterclaim to be allowed to it as against its indebtedness to the United States.

It is therefore unnecessary to determine whether or not the claims were properly presented under Section 951 of the Revised Statutes.

Plaintiff's motion for judgment on the pleadings is granted. Julian W. Mack, U. S. Circuit Judge. September 13, 1922.

31 At a Stated Term of the United States District Court Held in and for the Southern District of New York, at the United States Court and Post Office Building, in the Borough of Manhattan, City of New York, on the 5th day of February, 1923.

Present: Hon. Julian W. Mack, United States Circuit Judge.

[Title omitted.]

Order Granting Motion for Judgment.

Plaintiff having duly moved this Court for an order dismissing the counterclaims set up in the amended answer of defendant herein and for judgment on the pleadings herein, and said motion having duly come on to be heard before the Court on the 17th day of August, 1922, and after reading and filing the notice of motion dated the 8th day of June, 1922, and the complaint and amended answer and after hearing Frances V. McGurk, Assistant United States Attorney for the Southern District of New York, of counsel, in support of the motion and Abraham S. Gilbert of counsel, in opposition thereto and due deliberation thereupon having been had, and after filing the opinion of the Court, it is

Ordered, that the said motion be, and the same hereby is, in all 32 & 33 respects granted, and that the United States recover of defendant, Sacco Manufacturing and Retaining Works, Ltd., the sum of $13,296.02 with interest on $10,621.21 thereof from August 25, 1920 and on $2,674.81 thereof from August 20, 1920, together with its costs and disbursements to be taxed. Julian W. Mack, United States Circuit Judge.

34 Sir: You will please take notice that an order of which the within is a copy, was this day duly entered in the within-entitled action, in the office of the Clerk of the U. S. Dist. Ct., Southern Dist. of N. Y. Dated, N. Y., February 10th, 1923. Yours etc., Wm. Hayward, U. S. Attorney, Attorney for Plaintiff.

[File endorsement omitted.]

35 United States District Court, Southern District of New York.

[Title omitted.]

Judgment.

This action having been duly commenced on the 16th day of September, 1921 by the filing of a praecipe and issuance of a summons with notice and said summons with notice having been duly personally served upon defendant by delivering to and leaving with the copy thereof with Benjamin Lowenstein, its president, on the 17th day of September, 1921, and defendant thereafter and on the 30th day of September, 1921 duly appeared in the action by Jeremiah Wood, its attorney, and thereafter and on the 25th day of January, 1922 plaintiff served and filed its verified complaint herein and on the 8th day of June, 1922, defendant served and filed its amended answer to the complaint herein and thereafter and on the 8th day of June, 1922, plaintiff moved this Court for an order dismissing the counterclaims set up in the amended answer of defendant and for judgment on the pleadings, which said motion was granted and an order entered thereon on the 5th day of February, 1923 directing the entry of judgment as hereinafter provided, and the costs of plaintiff having been duly taxed in the sum of $27.52 by the Clerk of this Court.

36 & 37 Now, on motion of William Hayward, United States Attorney for the Southern District of New York, Attorney for plaintiff, it is

Ordered and adjudged that the plaintiff herein, United States of America, recover of defendant, Nassau Smelting & Refining Works, Ltd., the sum of thirteen thousand two hundred and sixty-six and 2 100 ($13,266.02) dollars, with interest on $10,624.21 thereof from August 25, 1920 and with interest on $2,614.81 thereof from August 20, 1920, interest amounting to $1,026.18 together with its costs in the sum of $27.52 making a total of Fifteen Thousand two hundred eighty-six & 72 100 ($15,286.72) dollars and that plaintiff have execution therefor. Alex Gilchrist, Jr., Clerk.

Judgment signed the 24 day of February, 1923.

38 [File endorsement omitted.]

Sir: You will please take notice that a Judgment of which the within is a copy, was this day duly entered in the within-entitled action, in the office of the Clerk of the U. S. Dist. Ct., Southern

Dist. of N. Y. Dated, N. Y., February 24, 1923. Yours, etc., William Hayward, U. S. Attorney, Attorney for Plff.

29 & 30 United States District Court, Southern District of New York.

[Title omitted.]

Certificate as to Jurisdictional Question.

In this cause I hereby certify that the jurisdiction of this Court to hear and determine the issues raised by the set-offs or counterclaims contained in the defendant's amended answer, is in issue and that the order dismissing the set-offs or counterclaims is based solely upon the ground that this Court is without jurisdiction to determine whether or not by reason of the facts set forth by the defendant there is any credit, set-off or counterclaim to be allowed to it as against its indebtedness to the United States.

This certificate is made conformably to Judicial Code Section 238, and the opinion filed herein is made a part of the record and will be certified and set up as a part of the proceedings together with this certificate. Dated, this 22nd day of March, 1923. Julian W. Mack, United States Circuit Judge.

31 [File endorsement omitted.]

Sir: Please take notice that the within is a copy of Certificate this day duly filed and entered herein in the office of the clerk of the U. S. Dist. Ct., So. Dist. of N. Y. Dated, City of New York, Mar. 26, 1923. Yours, Gilbert & Gilbert, Attorneys for Defts., 43 Exchange Place, City of New York. To Wm. Hayward, U. S. Atty., Attorney for Plff., City of New York.

32 United States District Court, Southern District of New York.

88861

[Title omitted.]

Assignment of Errors.

Now comes Nassau Smelting & Refining Works, Ltd., defendant herein, in connection with its petition for writ of error, and assigns error in the decision of the United States District Court for the Southern District of New York, in the above entitled cause and in the rendition of the judgment therein, as follows:

I. The Court erred in holding that it was without jurisdiction to determine whether or not by reason of the facts set forth by the defendant there is any credit, set-off or counterclaim to be allowed to it as against its indebtedness to the United States.

II. The Court erred in holding that the defendant's remedy against the United States pursuant to the Act of Congress approved March 2nd, 1919, Chapter 94, is vested exclusively in the Court of Claims.

III. The Court erred in granting the plaintiff's motion for judgment on the pleadings.

Wherefore, defendant prays that for the errors aforesaid the judgment entered herein on the 24th day of February, 1923
43 & 44 be reversed with costs.

Dated, New York, March 16th, 1923. Gilbert & Gilbert, Attorneys for Defendant. Office & P. O. Address, 43 Exchange Place, Borough of Manhattan, New York City.

45 [File endorsement omitted.]

Sir: Please take notice that the within is a copy of Assignment of Errors this day duly filed and entered herein in the office of the Clerk of the U. S. Dist. Ct., Southern Dist. of N. Y. Dated, City of New York, Mar. 26, 1923. Yours, Gilbert & Gilbert, Attorneys for Deft., 43 Exchange Place, City of New York. To U. S. Atty. Wm. Hayward, Attorney for Plff., City of New York.

46 United States District Court, Southern District of New York.

S806. E. 25-320

[Title omitted.]

Petition for Writ of Error.

And now comes Nassau Smelting & Refining Works, Ltd., the defendant herein, and says that on or about the 10th day of February, 1923, this Court entered an order granting the plaintiff's motion dismissing the setoffs or counterclaims set up in the amended answer of the defendant and for judgment on the pleadings and that on or about the 24th day of February, 1923 this Court entered final judgment herein in favor of the plaintiff against the said defendant, in which judgment and in the proceedings had prior thereto in this cause certain errors were committed to the prejudice of said defendant, all of which errors more fully appear in the assignment of errors filed with this petition.

Wherefore defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated may be sent to the Supreme Court of the United States, and that such
47 & 48 other and further proceedings may be had as may be just and proper in the premises. Gilbert & Gilbert, Attorneys for Defendant. Office & P. O. Address, 43 Exchange Place, Borough of Manhattan, City of New York.

49 [File endorsement omitted.]

SIR: Please take notice that the within is a copy of Petition for Writ of Error this day duly filed and entered herein in the office of the clerk of the U. S. Dist. Ct., Southern Dist. of N. Y. Dated, City of New York, March 26, 1923. Yours, Gilbert & Gilbert, Attorneys for Deft., 43 Exchange Place, City of New York. To Wm. Hayward, U. S. Atty., Attorney for Plff., City of New York.

50 & 51 United States District Court, Southern District of New York.

8806

[Title omitted.]

Order Allowing Writ of Error.

This 16th day of March, 1923, comes the defendant by its attorneys and files herein and presents to the Court its petition praying for the allowance of a writ of error, and an assignment of errors, intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the defendant giving bond accordingly in the sum of seventeen thousand ($17,000) Dollars, which shall operate as a supersedeas and cost bond. J. W. Mack, United States Circuit Judge, S. S., Jr.

52 [File endorsement omitted.]

SIR: Please take notice that the within is a copy of Order Allowing Writ of Error this day duly filed and entered herein in the office of the clerk of the U. S. Dist. Ct., So. Dist. of N. Y. Dated, City of New York, Mar. 26, 1923. Yours, Gilbert & Gilbert, Attorneys for Deft., 43 Exchange Place, City of New York. To Wm. Hayward, U. S. Atty., Attorney for Plff., City of New York.

53 & 53½ United States District Court, Southern District of New York.

[Title omitted.]

Bond on Writ of Error.

Know all men by these presents, that we, Nassau Smelting and Refining Works, Ltd., as principal and the Union Indemnity Company, a — organized and existing under and by virtue of the laws of the State of Louisiana, and having an office and place of business at No. 100 Maiden Lane, Borough of Manhattan, City and State of New York, as surety, are held and firmly bound unto the United

States of America in the full and just sum of Seventeen Thousand and 00/100 ($17,000) Dollars to be paid to the said United States of America; to which payment well and truly to be made the said principal binds itself, its successors and assigns [illegible] and the said surety company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of March, in the year of our Lord, one thousand nine hundred and twenty-three.

Whereas by an order of the above named court made on the 26th day of March allowing a writ of error in the above entitled action it was provided that such writ be allowed upon condition that the principal above named give bond in the sum of Seventeen Thousand and 00/100 ($17,000.00) Dollars.

Now, therefore the condition of this obligation is such that if the said Nassau Smelting and Refining Works, Ltd. shall prosecute said writ of error to effect and answer for all cost and damages if they fail to make said plea good then the above obligation to be void, otherwise to remain in full force and effect. Nassau Smelting & Refining Works, Ltd. By Benjamin Lowenstein, Pres. (Seal.) Union Indemnity Company. By James G. Mulligan, Vice-President. (Seal.) Attest: Edward J. Halligan, Attorney in fact.

[Verification omitted.]

State of New York,
County of New York:

On the 28th day of March, 1923, before me came Benjamin Lowenstein, to me known, who, being by me duly sworn, did depose and say that he resides in New York City, that he is the President of Nassau Smelting & Refining Works, Ltd., the corporation described in, and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order. E. Jacobson, Notary Public, Kings Co. No. 83, N. Y. Co. 61. Com. expires Mar. 30, 1924.

34 State of New York,
County of New York,
City of New York, ss.:

On the 26th day of March 1923, before me personally appeared James G. Mulligan to me known, and to me duly sworn, did depose and say: That he resides at Rockville Centre, N. Y.; that he is the Vice-President of the Union Indemnity Company, the corporation described in and which executed the attached instrument; that he knows the seal of the said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; that he signed his name thereto by like order and that said corporation has received from the Superintendent of Insurance, a certificate of sol-

torney under Section 182 of the Insurance Law of the State of New York, as amended by Chapter 182 of the Laws of 1913, and that such certificate has not been revoked. That said James G. Madigan further says that he is acquainted with Edward J. Halligan and knows him to be the Attorney-in-fact of said corporation; that the signature of said Edward J. Halligan subscribed to the said instrument is in the genuine handwriting of said Edward J. Halligan and was thereto subscribed by like order. ——— ———, Notary Public.

I hereby certify that the foregoing resolution is a true and correct copy of resolution of the Board of Directors of the Union Indemnity Company adopted on the 24th day of January, 1923, at a meeting held at its office in the City of New Orleans, Louisiana, and that said resolution is still in force.

In testimony whereof, I hereunto subscribe my name and seal of said Company this 26th day of March 1923. George E. Hayes, Vice-President.

35 & 36 Sirs: Please take notice that the within is a copy of bond, this day filed and entered herein in the office of the Clerk of the U. S. Ct., So. Dist. of N. Y.

Dated, City of N. Y. March 28, 1923. Yours, Gilbert & Gilbert, Attys. for Def't. 42 Exchange Pl., City of N. Y. To Wm. Hayward, Atty. for Plff.

Approved 3/28/23. Augustus N. Hand, D. J.

Copy received Mch. 29, '23. Wm. Hayward, U. S. Atty.

[File endorsement omitted.]

37 **Writ of Error.**

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UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the District Court before you, between United States of America, plaintiff, and Nassau Smelting & Refining Works, Ltd., defendant, a manifest error hath happened to the great damage of said defendant, as is said and appears by its complaint; we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Wash-

ington, on the 18 day of April 1923 next in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, this 23rd day of March, in the year of our Lord one thousand nine hundred and twenty-three and of the
58 & 59 Independence of the United States the one hundred and forty-seventh. Alex Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York.

The foregoing writ is hereby allowed. Julian W. Mack, United States Circuit Judge. A. G., Jr.

60 Sir: Please take notice that the within is a copy of Writ of Error this day duly filed and entered herein in the office of the Clerk of the U. S. Dist. Ct., So. Dist. of N. Y.

Dated, City of New York, Mar. 26, 1923. Yours, Gilbert & Gilbert, Attorneys for Deft., 43 Exchange Place, City of New York. To Wm. Hayward, U. S. Atty., Attorney for Plff., City of New York.

[File endorsement omitted.]

61 & 62 **Citation.**

THE UNITED STATES OF AMERICA, ss:

To United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington on the 18th day of April, 1923, next, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein Nassau Smelting & Refining Works, Ltd., is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District above named, this 23rd day of March, in the year of our Lord One Thousand Nine Hundred and twenty-three, and of the Independence of the United States the One Hundred and forty-seventh. Julian W. Mack, U. S. Circuit Judge. A. G., Jr.

63 [File endorsement omitted.]

61 In the United States Supreme Court.

[Title omitted.]

Stipulation of Record.

It is hereby stipulated and agreed that the foregoing record is a true and correct transcript of the record and proceedings had herein and may be certified by the Clerk of the Court and filed in the office of the Clerk of the Supreme Court of the United States.

Dated, New York, March 28th, 1923. Gilbert & Gilbert, Attorneys for Plaintiff-in-Error. Wm. Hayward, United States Attorney, Attorney for Defendant-in-Error.

65 In the United States Supreme Court.

[Title omitted.]

Clerk's Certificate.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 31st day of March, in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-seventh. Alex. Gilchrist, Jr., Clerk. [Seal District Court of the United States, Southern District of N. Y.]

Endorsed on cover: File No. 29,526. S. New York D. C. U. S. Term No. 976. Nassau Smelting and Refining Works, Ltd., plaintiff in error, vs. The United States of America. Filed April 7th, 1923. File No. 29,526.

(9208)

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W. B. STANSBU
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IN THE

Supreme Court of the United States

October Term, 1923.

NASSAU SMELTING AND REFINING WORKS, LTD.,
Plaintiff-in-Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant-in-Error.

No. 37

BRIEF ON BEHALF OF PLAINTIFF-IN-ERROR.

Statement.

The United States of America, Plaintiff below, commenced an action against the Nassau Smelting and Refining Works, Ltd., Respondent below, in the District Court of the United States for the Southern District of New York, to recover certain sums alleged to be due for merchandise sold and delivered to the defendant below. The defendant below interposed an answer setting up three set-offs or counterclaims to the causes of action set forth in the complaint, which were admitted. Each of the set-offs or counterclaims is in an amount less than $10,000 and is based upon agreements made prior to November 12, 1918, with an officer acting under the authority, direction or instruction of the Secretary of War during the emerg-

ency arising from the declaration of war with the German Empire, for a purpose connected with the prosecution of the war.

It is alleged that the Secretary of War has refused to offer a satisfactory adjustment, payment or compensation as provided for in Section 1 of the Act of March 2, 1919, entitled, "An Act to Provide Relief in Cases of Contracts Connected with the Prosecution of the War, and for Other Purposes." The prayer for relief is that the Court find and award the amount owing to the plaintiff-in-error and set off said amount against the amount sought to be recovered by the United States of America.

A motion for judgment on the pleadings was made by the United States of America and resulted in an order dismissing the set-offs or counterclaims set up in the answer of the plaintiff-in-error and awarding judgment in favor of the United States of America for the sum demanded in the complaint.

The Court did not consider the merits of the claims of the plaintiff-in-error but held that it was without jurisdiction to determine whether or not by reason of the facts set forth there existed any credit, set-off or counterclaim to be allowed against the indebtedness to the United States of America.

Assignment of Errors.

1. The Court erred in holding that it was without jurisdiction.

2. The Court erred in holding that the remedy granted by the Act of March 2, 1919, is vested exclusively in the Court of Claims.

POINT I.

The District Court has jurisdiction of the subject matter of the set-offs or counterclaims asserted by the Plaintiff-in-error.

The only question for consideration by this court is whether under *United States of America* v. *Pfitsch* (256 U. S. 547), the District Court was without jurisdiction to consider the merits of the claims of plaintiff-in-error.

The *Pfitsch* case was a suit against the United States to recover a sum of money under Section 10 of the Lever Act. In that case the President requistioned for the army on April 18, 1918, a radial drill belonging to Pfitsch. The Board of Appraisers of the War Department estimated its then value to be $3979.50 and awarded him that amount as compensation. Pfitsch declared this amount was unsatisfactory and insisted that the value was greater and that he was entitled also to interest from the date of the taking. He was paid seventy-five per centum of the award. Thereupon, he brought suit in the District Court of the United States for Southern New York to recover the balance alleged to be due. The case was tried by agreement, WITHOUT A JURY. The court found the value to be $4,550 and entered judgment for the part then unpaid with interest. Writ of error was taken directly to this Court. In disposing of that case Mr. Justice Brandeis, at page 549, said.

> "The preliminary question arises whether this court has jurisdiction ON DIRECT WRIT OF ERROR."

In discussing that question Mr. Justice Brandeis called attention in the opinion to the fact that in seventeen instances Congress had definitely provided by reference to the appropriate sections of the Judicial Code for concurrent jurisdiction of the Court of Claims and the District Courts sitting as a Court of Claims. He also called attention to the fact that "in four instances it (Congress) conferred jurisdiction only on the Court of Claims."

After considering the various statutes, Mr. Justice Brandeis concluded his opinion with the statement:

> "And where it (Congress) designates a jurisdiction in which the trial will be WITH A JURY instead of one where the trial will be by the court alone, it is our duty to give effect to this designation."

The writ of error was thereupon dismissed "for want of jurisdiction in this court."

In the Act of March 2, 1919, Congress conferred jurisdiction on the Court of Claims to make an award. Cases in the Court of Claims are, of course, disposed of without a jury. Subdivision 20 of Section 24 of the Judicial Code confers upon the District Court concurrent jurisdiction with the Court of Claims, and that section (Subdivision 20 of Section 24) contains the following provision:

> "All suits brought and tried under the provisions of this paragraph shall be tried by the Court WITHOUT A JURY."

So that in the case at bar, jurisdiction having been conferred upon the Court of Claims to dispose of these claims without a jury, resort to the

United States District Court under Subdivision 20 of Section 24 of the Judicial Code, gave the claimant (plaintiff-in-error), no greater right than it had in the Court of Claims. In neither jurisdiction was the claimant entitled to a jury trial.

Subdivision 20 of Section 24 of the Judicial Code comes from the so-called Tucker Act, being the Act of March 3, 1887, Sec. 2, Chap. 359.

The purpose of that act was to give to persons having claims against the United States for comparatively small amounts the right to bring suits in the courts of the United States in the districts where they and their witnesses reside without subjecting them to the expense and annoyance of litigating in a court located at Washington.

> *New York S. S. Co. v. United States*, 202 Fed. 311.

Unless jurisdiction be found in the Court of Claims, no action can be maintained under the Tucker Act (Subdivision 20 of Section 24 of the Judicial Code) except in those cases where Congress has expressly conferred jurisdiction on the District Courts, as under the Lever Act.

The construction which we urge for Section 2 of the Act of March 2, 1919, in no way modifies the provisions of that section. Where the claim is in excess of $10,000 it MUST be prosecuted in the Court of Claims. Where it is under $10,000 it MAY be prosecuted either in the Court of Claims or in the District Court.

All of the legislation referred to by Mr. Justice Brandeis in his opinion in the *Pfitsch* case created a right to sue the United States where

no right had theretofore existed. In all of those instances it was the primary purpose of Congress to permit a claim to be asserted. Accepting, as we must, the decision of this Court in the *Pfitsch* case as finally settling the law that in cases involving claims under the Lever Act, the claims must be asserted in the District Court *and appeal must be from the District Court to the Circuit Court of Appeals*, it does not necessarily follow that that case is authority for the contention that when Congress permitted the assertion of a claim against the United States, which could not theretofore have been asserted, and conferred jurisdiction on the Court of Claims, to make an award, that it thereupon repealed, to that extent, Subdivision 20 of Section 24 of the Judicial Code, a general act conferring jurisdiction on the District Court concurrently with the Court of Claims in cases where the claim asserted is less than $10,000.

The claims asserted by this plaintiff-in-error could not have been asserted at all prior to the enactment of the Act of March 2, 1919. The contracts sued on by the plaintiff-in-error had not been formally executed in accordance with the statutes applicable to the execution of contracts by the United States. If the Act of March 2, 1919, had never been enacted and this plaintiff-in-error had asserted a claim either in the Court of Claims or in the District Court it would have have been met with the defense that the contracts had not been executed pursuant to the authority conferred on officers of the United States, and in the manner provided by law.

All that this legislation sought to do was to validate these contracts, hedging this validation

about, however, by safeguards protecting the Government against improper claims; and that is as as far as this legislation went. It in substance permitted the assertion of claims against the United States on contracts informally executed which could otherwise not have been asserted.

We respectfully submit that the mere fact that in some instances the framers of legislation had in mind claims of less than $10,000 as well as claims of over $10,000 and to have made specific mention of the fact that claims under $10,000 might be prosecuted in the District Courts under Subdivision 20 of Section 24 of the Judicial Code does not necessarily indicate a purpose or intent on the part of Congress to compel all claimants under the Act of March 2, 1919, whether their claims be more or less than $10,000, to have their claims adjudicated solely and exclusively in the Court of Claims. There is no more reason for imposing a hardship on claimants against the United States under the Act of March 2, 1919, than there is in the case of any other claim against the United States. The whole theory of the legislation indicates a desire on the part of Congress not to impose undue hardship on claimants and to relieve claimants of the burden and expense of attending before the Court of Claims in Washington where the claim sought to be presented is less than $10,000.

We respectfully submit that the learned court below, in refusing jurisdiction, was clearly in error, and that the case must be remanded to the District Court for disposition on the merits.

Respectfully submitted,

A. S. Gilbert,
Counsel for Plaintiff-in-Error.

(10)

Supreme Court, U. S.
FILED
SEP 10 1924
WM. R. STANSBURY
CLERK

No. 37

In the Supreme Court of the United States

OCTOBER TERM, 1924

NASSAU SMELTING AND REFINING WORKS, LTD.,
PLAINTIFF IN ERROR

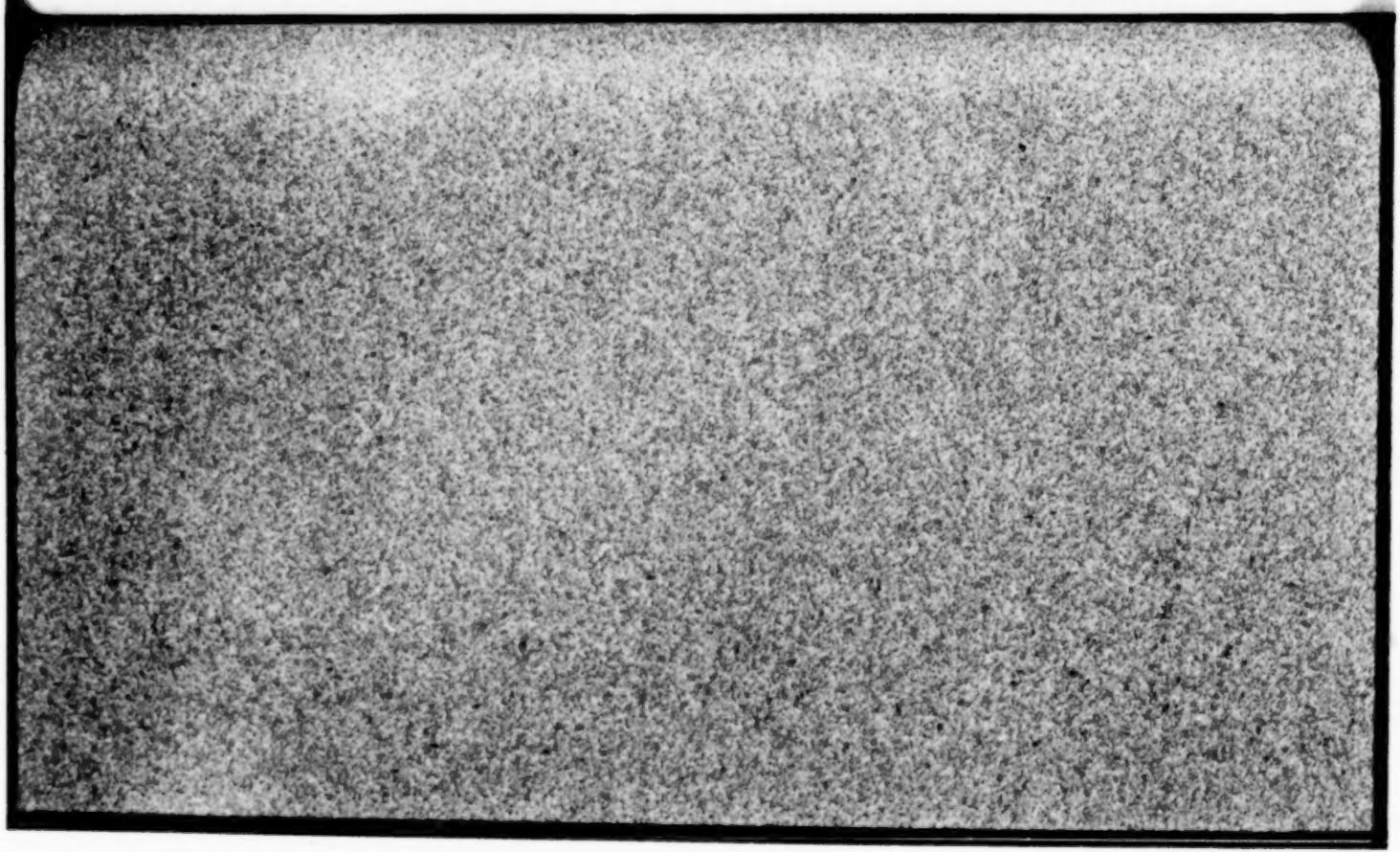
v.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1924



In the Supreme Court of the United States

OCTOBER TERM 1924

NASSAU SMELTING AND REFINING WORKS, Ltd., plaintiff in error
v.
THE UNITED STATES OF AMERICA
No. 37

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

STATEMENT

This writ of error brings up for review a judgment of the District Court of the United States for the Southern District of New York, dismissing three set-offs or counterclaims interposed by plaintiff in error, hereinafter called the Nassau Co., upon the ground that the court had no jurisdiction to entertain them. A certificate in conformity with Section 238 of the Judicial Code was made by Judge Mack, that the jurisdiction of the court of the subject matter of the set-offs or counterclaims was in issue, and was decided adversely to the plaintiff in error, and that by reason thereof, and not otherwise, the judgment of dismissal was entered, because—

> this Court is without jurisdiction to determine whether or not by reason of the facts set forth

by the defendant there is any credit, set-off, or counterclaim to be allowed to it as against its indebtedness to the United States. (Rec. 15.)

The specific question is whether the District Court, under the Act of Mar. 2, 1919, c. 94, 40 Stat. 1272 [1] (known as the Dent Act), has jurisdiction to entertain an action against the United States under agreements admitted to be within the purview of Section 1 of that Act.

[1] The Act, so far as it is pertinent to the case at bar, provides:

"That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition, or control of equipment, materials, or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law: *Provided*, That in no case shall any award, either by the Secretary of War or the Court of Claims, include prospective or possible profits on any part of the contract beyond the goods and supplies delivered to and accepted by the United States and a reasonable remuneration for expenditures and obligations or liabilities necessarily incurred in performing or preparing to perform said contract or order: * * *.

SEC. 2. That the Court of Claims is hereby given jurisdiction on petition of any individual, firm, company, or corporation referred to in Section 1 hereof to find and award fair and just compensation in the cases specified in said section in the event that such individual, firm, company, or corporation shall not be willing to accept the adjustment, payment, or compensation offered by the Secretary of War, as hereinbefore provided, or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment, or compensation, as provided for in said section.

The United States commenced an action against the Nassau Company in the District Court to recover sums due for merchandise sold and delivered to that company. The amended answer of the defendant below admitted all of the allegations of the government's complaint, and then affirmatively pleaded three separate and distinct set-offs or counterclaims thereto, each in an amount less than $10,000. They are alleged to be based upon agreements made during the late war and prior to November 12, 1918, with an officer acting under authority conferred upon him by the Secretary of War, for the manufacture of copper driving bands used in connection with the prosecution of the war. These set-offs or counterclaims are for balances alleged to be due under these agreements, and represent the difference between the amounts demanded by the Nassau Company and the amounts which had been paid by the United States. (Rec. 7, 8, 9, 10.) It is also alleged that the claims have been duly presented in accordance with the Act; that the Secretary has refused to make a satisfactory adjustment, and the prayer asks an award by the District Court, to be set-off against the amount demanded by the United States in its complaint, and, in the event that the total award exceeds the claim of the United States, it prays judgment against the United States for the excess. A motion was made by the government for judgment on the pleadings, and for an order dismissing the set-offs or counterclaims, which was granted and judgment

rendered in favor of the United States for the full amount of its claim. (Rec. 12, 13.)

The sole question involved here is whether the United States District Courts have concurrent jurisdiction with the Court of Claims under Section 24 (20) of the Judicial Code over the claims specified in Section 1 of the Dent Act not exceeding $10,000 each, or whether Section 2 of the latter Act confers exclusive jurisdiction upon the Court of Claims irrespective of the amount involved. No other question is raised or discussed in the brief of the plaintiff in error.

ARGUMENT

The Court of Claims has exclusive jurisdiction of claims arising under the Dent Act

To support its contention, the plaintiff in error discusses at length the case of *United States* v. *Pfitsch*, 256 U. S. 547. We think that case supports our contention. That action was brought under Section 10 of the Lever Act (Act of August 10, 1917, c. 53, 40 Stat. 276, 279), which by its terms conferred jurisdiction on the District Courts. The only question in this Court was whether in hearing such cases the District Court exercised its ordinary jurisdiction, or whether the jurisdiction was that exercised in the manner provided by Section 24 (20) of the Judicial Code, concurrently with the Court of Claims. In holding that the jurisdiction exclusively granted by the Lever Act was to be exercised according to the

usual procedure of the District Court, this Court made a complete survey of the war legislation conferring jurisdiction upon courts to hear suits against the United States. In this connection Mr. Justice Brandeis, at page 553, said:

> In seventeen instances it (Congress) definitely provided, by reference to the appropriate sections of the Judicial Code, for concurrent jurisdiction in the Court of Claims and the District Courts, sitting as a Court of Claims. In the four instances above set forth it conferred jurisdiction only on the District Courts. In four instances it conferred jurisdiction only on the Court of Claims.

The Dent Act is cited as one of the four instances in which jurisdiction had been conferred *only* on the Court of Claims.

Continuing, Mr. Justice Brandeis said:

> The established rule of statutory construction should lead us to give effect in every practical manner to the distinctions which Congress has seen fit to make.

This Court has, therefore, expressly recognized in the *Pfitsch* case that the Court of Claims under Section 2 of the Dent Act is the only Court that has jurisdiction of claims within that Act. Had Congress intended otherwise it would undoubtedly have referred to Section 24 (20) of the Judicial Code, as it has done in the other Acts cited in the *Pfitsch* case at page 553, or would have used plain language to convey such an intent.

The fact that Congress in some instances has conferred concurrent jurisdiction on the District Courts over claims against the United States does not indicate that it intended to do so in all cases, even though it may not be apparent why Congress should make distinctions. *Thornley* v. *United States*, 113 U. S. 310, 315.

The United States can be sued for such causes and in such courts *only* as it has by act of Congress permitted. *United States* v. *Gleeson*, 124 U. S. 255, 258 And where it has specified a special remedy, as in Section 2 of the Dent Act, that remedy is exclusive, *United States* v. *Babcock*, 250 U. S. 328, 331, and it will not be enlarged by implication. *Price* v. *United States*, 174 U. S. 373, 375. It is no answer to say that if the plain terms of the Dent Act are followed it may result in inconvenience to the litigant in the prosecution of his claim against the government, for this will not justify a departure from the express terms of the Act. *American Railroad Co.* v. *Birch*, 224 U. S. 547, 557; *United States* v. *Rider*, 163 U. S. 132, 140; *Claflin* v. *Commonwealth Ins. Co.*, 110 U. S. 81, 93.

The Dent Act having provided a specific remedy for a class of cases of an unusual character, in which but for the Act no redress could have been obtained, the jurisdiction to try such cases should be confined to that Court which by the terms of the Act was exclusively empowered to try them.

CONCLUSION

The judgment of the Court below should be affirmed.

JAMES M. BECK,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

SEPTEMBER, 1924.

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NASSAU SMELTING & REFINING WORKS, LTD. *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 37. Argued October 7, 1924.—Decided November 17, 1924.

1. The question whether the District Court, having jurisdiction under Jud. Code, § 24, of an action brought by the United States, has statutory power to entertain counterclaims by the defendant against the Government, involves the jurisdiction of the court as a federal court. P. 105.
2. A decision, rejecting the counterclaims as not within jurisdiction conferred by federal statute, is therefore reviewable here directly under Jud. Code, § 238. *Id.*
3. The objection to a suit against the United States is fundamental, whether it be in the form of original action, set-off or counterclaim, and jurisdiction in either case does not exist without specific congressional authority for it. P. 106.
4. Under the Dent Act, c. 94, §§ 1 and 2, 40 Stat. 1272, allowing suits against the United States on certain kinds of agreements not executed in the manner prescribed by law, jurisdiction of such petitions was confined to the Court of Claims exclusively. *Id.*
5. A party in the District Court who unsuccessfully sought adjudication under the Dent Act on agreements alleged not to have been executed in the manner required by law, was thereby precluded on writ of error here, from the position that they should have been adjudicated as contracts under Jud. Code, § 24, par. 20. P. 108.

Affirmed.

ERROR to a judgment of the District Court in an action brought by the United States to recover sums due for merchandise sold and delivered by it to the defendant. The amended answer admitted the allegations of the complaint and pleaded three separate and distinct set-offs or counterclaims each in an amount less than $10,000, for balances alleged to be due under agreements made during the late war and before November 12, 1918, under authority of the Secretary of War, for supplies used in the prosecution of the war. It was alleged that the Secretary had refused satisfactory adjustment, and an award by the District Court was prayed, to be set off against the amount demanded by the United States, and, in case of an excess in favor of the defendant, judgment was prayed therefor. The trial court, on motion of the Government, dismissed the set-offs or counterclaims and granted judgment for the United States on the pleadings, for the full amount of its claim. Direct writ of error was prosecuted under Jud. Code, § 238.

Mr. A. S. Gilbert, for plaintiff in error, submitted.

Paragraph 20 of § 24, Jud. Code, comes from the so-called Tucker Act,—March 3, 1887, c. 359, § 2, 24 Stat. 505. The purpose of that act was to give to persons having claims against the United States for comparatively small amounts the right to bring suits in the courts of the United States in the districts where they and their witnesses reside without subjecting them to the expense and annoyance of litigating in a court located at Washington. *New York S. S. Co.* v. *United States*, 202 Fed. 311.

Unless jurisdiction be found in the Court of Claims, no action can be maintained under the Tucker Act (par. 20, § 24, Jud. Code,) except in those cases where Congress has expressly conferred jurisdiction on the District Courts, as under the Lever Act.

The construction which we urge for § 2 of the Dent Act in no way modifies the provisions of that section. Where the claim is in excess of $10,000, it must be prosecuted in the Court of Claims. Where it is under $10,000, it may be prosecuted either in the Court of Claims or in the District Court.

All of the legislation referred to in the opinion in *United States* v. *Pfitsch*, 256 U. S. 547, created a right to sue the United States where no right had theretofore existed. In all of those instances it was the primary purpose of Congress to permit a claim to be asserted. Accepting, as we must, the decision of this Court in the *Pfitsch Case* as finally settling the law that in cases involving claims under the Lever Act, the claims must be asserted in the District Court and appeal must be from the District Court to the Circuit Court of Appeals, it does not necessarily follow that that case is authority for the contention that, when Congress permitted the assertion of a claim against the United States, which could not theretofore have been asserted, and conferred jurisdiction on the Court of Claims, to make an award, it thereupon repealed, to that extent, par. 20, § 24, Jud. Code, a general act conferring jurisdiction on the District Court concurrently with the Court of Claims in cases where the claim asserted is less than $10,000.

The claims asserted by this plaintiff in error could not have been asserted at all prior to the enactment of the Dent Act. The contracts sued on by the plaintiff in error had not been formally executed in accordance with the statutes applicable to the execution of contracts by the United States. If the Dent Act had never been enacted and this plaintiff in error had asserted a claim either in the Court of Claims or in the District Court, it would have been met with the defense that the contracts had not been executed pursuant to the authority conferred on officers of the United States, and in the manner provided by law.

All that this legislation sought to do was to validate these contracts, hedging this validation about, however, by safeguards protecting the Government against improper claims. It in substance permitted the assertion of claims against the United States on contracts informally executed which otherwise could not have been asserted.

The mere fact that in some instances the framers of legislation had in mind claims of less than $10,000 as well as claims of over $10,000 and have made specific mention of the fact that claims under $10,000 might be prosecuted in the District Courts under par. 20, § 24, Jud. Code, does not necessarily indicate a purpose or intent to compel all claimants under the Dent Act, whether their claims be more or less than $10,000, to have their claims adjudicated solely and exclusively in the Court of Claims. There is no more reason for imposing a hardship on claimants against the United States under the Dent Act than there is in the case of any other claim against the United States.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for the United States.

Mr. Chief Justice Taft delivered the opinion of the Court.

This suit was brought by the United States against the Nassau Smelting & Refining Works in the United States District Court for the Southern District of New York, to recover $15,000, with interest at 6 per cent., for copper bands and pig lead sold and delivered. By its amended answer the defendant did not deny its obligation as claimed, but set up, as counterclaims, balances due from the United States to it of $6,023.81 for one delivery of copper bands, another of $5,836.42, and a third of

$2,576.09. The averment in the answer is, as to each of these claims, that the agreement upon which the bands were furnished was not executed in the manner prescribed by law and so was embraced within the saving provisions of § 1 of the Act approved March 2, 1919, entitled "An Act To provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," and known as the Dent Act (c. 94, 40 Stat. 1272). The defendant's contention was that as each counterclaim was for less than $10,000, subdivision 20 of § 24 of the Judicial Code of the United States gave the District Court jurisdiction to find and award, by way of counterclaims herein, a fair and just compensation to the defendant from the United States. The United States moved for judgment on the pleadings for the full amount claimed in the petition, without deduction of the counterclaims, and this motion was granted, the court holding it had no jurisdiction of suits against the United States under the Dent Act like those presented as counterclaims herein, either as original actions or as set-offs or counterclaims. Judgment was accordingly entered on the complaint for the United States in the sum of $15,286.72. Proceedings in error were prosecuted, and the circuit judge, acting as a district judge, certified, conformably to the Judicial Code, § 238, that the jurisdiction of the court was in issue and that the order dismissing the set-offs or counterclaims was based solely upon the ground that the court had no jurisdiction to determine them.

It was suggested at the hearing in this Court that, as there was unquestioned jurisdiction of the suit by the United States, under the first paragraph of § 24 of the Judicial Code, the case could not be brought directly from the District Court to this Court on a certificate under § 238 of the Code as to the jurisdiction of the counterclaim. But we think that unquestioned jurisdiction over the complaint does not prevent a certificate as to jurisdic-

tion of the new suit attempted in the form of a counterclaim. The question is not one as to the introduction of counterclaims as a mere matter of procedure. The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it. Nor is there doubt that the question is one which involves the jurisdiction of the District Court as a federal court under the statutes of the United States, for the jurisdiction of the District Court in this regard is wholly dependent on such statutes.

The second question is whether such counterclaims as are averred in the answer are authorized by par. 20 of § 24 of the Judicial Code. That paragraph provides that the District Court of the United States shall have jurisdiction, concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable. It is argued that these counterclaims are each less than $10,000 in amount and are founded on a law of Congress and upon a contract, express or implied, with the United States and do not sound in tort, and therefore are within the power of the District Court to enforce them. The fatal objection to this argument is that these claims are based exclusively on the Dent Act (March 2, 1919, c. 94, 40 Stat. 1272, 1273). This act was passed to allow the Secretary of War to adjust and discharge any agreement entered into by any officer or agent acting under his

authority or that of the President, during the emergency of the war, and prior to November 12, 1918, with any person, firm or corporation for the production, manufacture or sale of equipment, materials, or supplies, or for services connected with the prosecution of the war, when the agreement had been performed in whole or in part, or expenditures had been made or obligations incurred upon the faith of the same by such person, firm or corporation prior to November 12th, and such agreement had not been executed in the manner prescribed by law. By § 2 of the act the Court of Claims is given jurisdiction, on the petition of the claimant described in § 1 of the act, to find and award fair and just compensation in such cases, if the claimant is not willing to accept the compensation offered by the Secretary of War. There is no other provision in the act for judicial action than this. This must be held to be an exclusive jurisdiction conferred upon the Court of Claims. This was the view of this Court as shown in *United States* v. *Pfitsch*, 256 U. S. 547, 553. In that case all the statutes which had been passed during the war, giving jurisdiction to various courts of the United States for judicial settlement of controversies with the Government, were considered and commented on, and among the four instances in which jurisdiction was said to be conferred only on the Court of Claims was the Dent Act. It is true that the question as to the operation of the Dent Act was not involved in the case. But the opinion in throwing light upon the effect of § 10 of the Lever Act (August 10, 1917, c. 53, 40 Stat. 276, 279), providing for suits in the District Courts in controversies arising thereunder, made a careful comparison of all the acts of the kind and a classification of them. We see no reason to change our opinion as to the construction of the Dent Act in this regard. The defendant below placed itself squarely within the requirements of the Dent Act and sought adjudication of its

claims on the ground that the agreements under which recovery was sought had not been executed in the manner prescribed by law. In this way it put itself outside the field covered by par. 20 of § 24 of the Judicial Code, and by its own admission limited itself to the remedy possible under the Dent Act. It is unnecessary for us to consider, therefore, whether, but for the Dent Act, it might have brought suit under the general language contained in par. 20 of § 24. The effect of the Dent Act was to limit it to the Court of Claims. The District Court, therefore, was right in holding that it had no jurisdiction of the counterclaims and in giving judgment on the pleadings for the Government.

Affirmed.